

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the matter of:

STUDENT,

Petitioner,

v.

ORANGE UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2005070130

DECISION

Administrative Law Judge, Robert F. Helfand, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Orange, California on June 20-30 and August 17-22, 2006.

Petitioner (Student) was represented by attorney Tania L. Whiteleather. Student's mother (Mother) and father (Father) and Chris Russell, advocate for Student, were also present at various times during the hearing. Student did not attend the hearing.

Respondent Orange Unified School District (District) was represented by attorney Patrick Balucan. Dr. William Gee, Director of Pupil Services/Special Education Local Plan Area (SELPA) was also present through much of the hearing.

On March 16, 2004, Student filed a request for due process hearing. The record of this due process hearing was opened on June 20, 2006. Testimony was taken June 20, 21, 22, 23, 27, 28 and 29 and August 17, 18, 21 and 29 with testimony concluding on September 7, 2006. Closing arguments were filed and the matter was submitted on October 2, 2006. The parties have stipulated that the decision by OAH is due on November 15, 2006.

ISSUES¹

1. Did the District deny Student a free, appropriate public education (FAPE) by failing to find him eligible for special education services under the category of serious emotional disturbance in March 2002?
2. Did the District deny Student a FAPE by failing to find him eligible for special education services under the category of serious emotional disturbance during the 2002-2003 school year?
3. Has the District denied Student a FAPE since the 2002-2003 school year?
4. Did the District commit procedural violations of Student's rights which resulted in substantive denials of a FAPE?
5. Are Student's parents entitled to reimbursement of the costs that they expended for mental health services, residential respite care and other services in 2002 to 2006?

CONTENTIONS OF THE PARTIES

Student contends that the District denied him FAPE because (1) the District improperly failed to find Student eligible for special education services in March and November 2002 under the category of severe emotional disturbance; (2) since the 2002-2003 school year, Student's Individual Education Plan (IEP) did not contain appropriate mental health services; and (3) the District committed procedural violations which deprived Student of FAPE when it failed to provide prior written notice to parents when it refused Student's request for certain services.² Student further contends that, based upon the failure of the District to provide FAPE, he is entitled to compensatory education and his parents are entitled to be reimbursed for costs expended for mental health services, residential placement, and other services from 2002- 2003 through the 2005-2006 school year.

The District contends that (1) it appropriately assessed Student in all areas of suspected disability and correctly concluded that Student was not eligible for special education services in March and November 2002; and (2) since the 2002-2003 school year, the District has provided

¹ The issues have been re-framed for the purposes of this decision.

² At the Hearing, Student offered no evidence as to any procedural violations committed by the District except as to lack of prior written notice by the District in denying Student's request for Love and Logic in 2005. In Petitioner's Closing Brief, Student raised for the first time that (1) the IEP team make-up was improper in that Student's therapist at Canyon Acres was not part of the IEP team, and (2) the District failed to comply with its child find obligations. On October 13, 2006, the District filed a written objection to the addition of these new issues. Student filed a response the same day. On October 17, 2006, the ALJ issued an order which sustained the District's objection to the addition of these new issues.

Student with FAPE. Thus, the District contends that Student and his parents are not entitled to any compensatory education or reimbursement for any costs for mental health services, residential placement or any other related costs incurred.

FACTUAL FINDINGS

1. Student's parents adopted Student at the age of eight months in 1995. Both before and after Student's birth, Student's birth mother had been involved in illicit drugs and alcohol abuse. Student was moved to two foster homes prior to his adoption. Three years after adoption, Student's parents adopted another son (Brother).

2. Student acted like any newborn until age three. At three, Student started to refuse verbal instructions from Mother, was defiant and generally unruly. At three and a half, Student started becoming very rough with Brother to such a degree that Student's parents would not leave the two boys alone together. Student also began to read words.

3. Prior to starting Kindergarten, Student began to throw tantrums whenever his parents told him that he could not do something. As time went on, these tantrums became more violent and sometimes would last for hours. During these tantrums, Student would throw things, hit his head on the floor and would attempt to punch and kick Mother whenever she attempted to hold and comfort him. Student also began destroying items in his room and showed no remorse for his actions. Though Student appeared to like preschool, Mother encountered problems getting Student out of bed and dressed and ready to leave the house to go to preschool.

4. Student attended Kindergarten at the Villa Park Elementary School in the District. Mother testified that Student enjoyed school but had problems sharing with the other children and was a bully on the playground.

5. In August 2000, Student attended first grade at the Serrano Elementary School until January 2001 when he transferred to Imperial Elementary School where Jacqueline Radus was his teacher. Ms. Radus, who taught elementary school for 31 years before retiring in 2001, found Student to be a "bright little boy." If he did not get what he wanted, Student would yell and slam his desk and sometimes throw items. Student refused to participate in class group activities and was a "loner" on the playground. Because of Student's behavior, Ms. Radus suggested to Mother that she take Student to a doctor to assist in controlling his behavior. Despite Student's behavior, he was graded on his report card as performing at grade level in Reading Comprehension, Writing Mechanics, Spelling, Mathematics Problem Solving, History/Social Science and Science/Health. Student was graded slightly below average in Listening and Speaking and "needs improvement" in Writing Content. Student was graded slightly above average in Reading-Word Analysis and Mathematics Computation. During this time, Mother took Student to see a psychiatrist, Dr. Jun, who prescribed Risperdal to help him "mellow out."

The 2001-2002 School Year and the March 2002 Assessment and IEP

6. In August 2001, Student entered the second grade with Faye Isaacson as his teacher. Student's behavior at home did not improve and in fact escalated to where Mother was compelled to take protective measures each morning while attempting to get Student ready for school. At school, Student did well academically. Ms. Isaacson found Student to be well-behaved in the classroom and performing at grade level or above. Student had problems on the playground with other students by hitting and pushing his classmates. Student became frustrated easily and many times would make noises like growling. Student often appeared depressed and sad. Student told Ms. Isaacson that he was sad because his mother did not love him. Student began seeing a new psychiatrist, Dr. Sandhya Gudapati, who diagnosed Student with Impulse Control Disorder. Dr. Gudapati placed Student on Risperdal (.25 mg in the morning and .5 mg in the afternoon) and Zoloft (25 mg daily). Student's medication caused him to be tired which occasionally led to Student having problems completing his class work.

7. During the second grade year, Student's behavior problems continued at home. Because of Student's out of control behavior on the playground, Mother requested on February 21, 2002 that the District conduct an assessment of Student's social/emotional behavior as well as other areas to determine if Student could be eligible for special education services including mental health counseling. The District then assessed Student to see if he qualified for special education services under the categories of severe emotional disturbance and specific learning disability.

8. Dr. Maxann Shwartz, the school psychologist at Imperial School, authored the written assessment report. Dr. Shwartz is a licensed clinical psychologist and credentialed education psychologist. She received her Masters and Ph.D. in Psychology from the California School of Professional Psychology. Other members of the IEP team were Ms. Isaacson, Student's teacher; Michelle Ewing, Speech and Language Specialist; Michelle Scheiber, Resource Specialist; Patricia Ross, R.N., school nurse and Mother.

9. Ms. Ewing conducted a Speech and Language assessment by administering the Woodcock Language Proficiency Battery-Revised; Peabody Picture Vocabulary Test-Third Edition; and the Expressive One-Word Picture Vocabulary Test. Student's standard scores were in the average to above-average range compared to other children his age. Ms. Ewing concluded that Student did not display any weaknesses in the speech/language area.

10. Student was given the Bender Gestalt Test of Visual-Motor Integration which demonstrated that Student appeared to have well developed fine motor control and adequate visual processing.

11. Ms. Scheiber administered the Woodcock-Johnson III to measure academic achievement. Results indicated that Student was performing in the superior range in basic reading skills, and in the high average range in math. Student's written expression scores were within the superior range of functioning. No weaknesses were demonstrated compared to other children of the same age.

12. The Wechsler Intelligence Scale for Children-Third Edition (WISC III) was administered to Student. His Performance IQ fell within the average range of functioning with significant strengths in the Verbal domain while Student's general fund of knowledge was superior (98th percentile). Verbal strengths were noted in attention and short-term auditory memory, abstract and arithmetic reasoning and definitive vocabulary. Student received an average score in verbal comprehension. He demonstrated exceptional strengths in visual sequencing, planning ability, and common sense. Average scores were noted in visual-spatial relations, part-to-whole reasoning and immediate visual memory. Thus, the report concluded that there were no significant weaknesses in Student's measured cognitive capabilities.

13. To evaluate Student's social/emotional functions, Dr. Shwartz utilized a structured interview, projective drawings, a Behavior Checklist by Student's teacher, the Devereux Scales of Mental Disorders (DSMD) which was given to the teacher and Mother, Behavioral Evaluation Scale-2 Home Version (BES-2), plus teacher/psychologist observations.

14. The BES-2 resulted in a Quotient Standard Score of 63 which placed Student in the third percentile. The subscale scores were Learning Problems-10, Interpersonal Difficulties-0, Inappropriate Behaviors-0, Unhappiness/Depression-1, and Physical Symptoms/Fears-2. Scores below seven, like those of Student, fall within the significant range for emotional and behavioral disturbances.

15. The DSMD Home Version is a checklist which was filled out by Mother. The DSMD is used to assess maladjustment in children. The results of the DSMD Home Version indicated that Student was experiencing significant levels of difficulty in the areas of conduct, attention, anxiety, depression, and acute problems. Student's overall Critical Pathology Index fell between the elevated and borderline range representing the propensity for severe mental, behavioral or emotional disturbances that may be episodic and/or recurrent.

16. The DSMD-School Form was given to Student's teacher, Ms. Isaacson. The scoring indicated that Student lacked appropriate social interaction skills and anger management skills which can result in Student acting out with aggression and anger.

17. Dr. Shwartz concluded that her observations of Student, the projective drawings, and teacher reports indicate that Student tended to be resistant in school, gave up easily and had a great deal of difficulty working in a group setting. Student's strengths included a good ability to work independently, good concentration and self-confidence. Student was communicative and deliberate in his work although he tended to be emotionally immature and impulsive.

18. Based on the information obtained during the assessment, Dr. Shwartz concluded that although Student exhibited significant emotional and behavioral difficulties, Student's behavior at school had not escalated to the point of impacting Student's academic performance. Thus, Dr. Shwartz and the IEP Team found that Student was not eligible for special education programming under the category of severe emotion disturbance. The report also recommended that Student's parents consider referral for individual counseling/psychotherapy for Student to address his social/emotional difficulties.

19. In March 21, 2002, an IEP meeting was held where the Assessment Report was presented to Mother after she was explained Student's educational rights. At the meeting, the IEP team considered whether Student was eligible for special education services under the categories of learning disabled and serious emotional disturbance. The team concluded that at that time, Student was not eligible for special education. Mother signed the IEP form and checked the box that states: "I CONSENT to program and services." Dr. Schwartz established that Mother did not state any disagreement with the team's conclusion that Student was not eligible for Special Education nor did Dr. Schwartz hear from either of Student's parents the remainder of the school year.

20. Because Student failed to produce any evidence that the March 2002 assessment, Dr. Schwartz's recommendation, and the IEP team's finding of ineligibility for special education was improper, Student failed to establish that the District denied Student a FAPE in March 2002. Although Student was experiencing emotional problems, Student's emotional problems did not result in an impairment of his ability to benefit from the school setting nor did it have an adverse effect on his educational performance.

Summer and Fall 2002

21. During the summer of 2002, Student's inappropriate behavior at home continued. While visiting his grandfather, Student kicked him in the chest when Student was being reprimanded. Also on another occasion, Student hit Mother on her arm when she grabbed him. Student continued taking Risperdal and Depacote medication daily.

22. In August 2002, Student entered the third grade class of Sarah Hughes. Ms. Hughes, who has over 15 years experience as an elementary school teacher, described Student as an intelligent, curious, articulate and lively little boy who had trouble sitting still and concentrating in class. Student continued to have problems interacting with his classmates as he would annoy his peers and was very physical on the playground. Student would inappropriately touch his classmates and say crude or rude expressions to them. Student was a "loner" and had trouble maintaining eye contact when being spoken to. Ms. Hughes felt that Student had a lack of remorse for his actions. Ms. Hughes placed Student on a behavior contract in order to help keep him on task in class.

In the fall while Ms. Hughes was absent following a death in her family, Student received a one day suspension for drawing a picture showing one boy shooting another boy with the caption: "Please do not destarve! Or I'll destroy you!" Student on several occasions also kissed other boys on the mouth on the playground. But as a whole, Ms. Hughes felt that Student was making educational progress and that his behavior problems were manageable. Ms. Hughes noted that Student was not one of her main behavior problems and that he responded well to anything positive.

23. On September 19, 2002, Student's mother requested that an assessment be done because Student "is very defiant towards parents" and is abusive toward his brother and the parents "wanted to know if the school psychologist saw the same behaviors at school." The

District requested on September 21, 2002 that the Orange County Mental Health Services, Children and Youth Services Division (OCMH), conduct an evaluation.

24. On October 28, 2002, OCMH clinical psychologist Mark A. Schwartz, Ph.D. submitted a Mental Health Assessment. Dr. Schwartz interviewed Student and his parents and reviewed District records. Dr. Schwartz recommended that both Student and his parents be provided counseling with the intent of providing them with more productive approaches to their roles in the family. Dr. Schwartz stated that the parents would benefit from parenting approaches based on “finesse rather than ‘strictness.’” Dr. Schwartz also recommended that Student be referred to Children and Youth Services for psychiatric services.

November 14, 2002 Assessment and November 22, 2002 IEP Meeting

25. School psychologist Emily Popp Santiago (Ms. Popp) wrote the November 14, 2002 Assessment Team Report. Ms. Popp, a credentialed school psychologist, received her B.A. in Psychology and an M.S. in Psychology plus a Specialist in Education certificate from the University of Kentucky. She has been employed as a school psychologist since the Fall Trimester 2002. Other members of the IEP team were Patricia Ross, R.N., school nurse; Sarah Hughes, Student’s third grade teacher; and Father and Mother.

26. Ms. Popp did not administer any tests to measure Student’s academic and cognitive functions since these tests had been administered within a one year period in the spring of 2002 and Student’s current teacher, Ms. Hughes, found Student to be intelligent and his report card indicated that Student was at or above grade level in his studies. Ms. Hughes informed Ms. Popp that Student was not a major problem in the classroom.

Ms. Popp did administer the following: Scales of Independent Behavior Revised, Short Form (SIB-R) to Mother; the Behavior Assessment System for Children (BASC) to Mother, Father and Ms. Hughes; the Devereux DSMD-Home Version to Father and Mother; the Devereux-School Version to Ms. Hughes; and the Kovacs’ Children Depression Inventory (CDI) to Student. Ms. Popp also gave Student the Kinectic Drawing System for Family and School and the Sentence Completion Form. Additionally, Ms. Popp observed Student in the classroom and on the Playground and reviewed the OUSD Classroom Behavior Checklist from Ms. Hughes.

27. The SIB-R measures adaptive behavior. Student’s Broad Independence, a measure of adaptive behavior, was age appropriate to advanced compared to his age group; but overall, Student demonstrated serious problem behaviors and serious internalized and asocial maladaptive behaviors. The SIB-R indicated that Student will need limited support because of his problem behaviors.

The BASC administered to Student’s parents indicated significant behavior problems as to Aggression, Conduct Problems, Depression, Adaptability, Social Skills and the Externalizing and Adaptive Skill Composites scales. The DSMD-Home Version indicated significant problem behaviors at home on the following scales: Conduct, Anxiety, Depression, Autism and the Externalizing and Internalizing Composites. The DSMD-Home Version

indicated that Student has a tendency to be disruptive and hostile as well as withdrawn and has an inability to experience pleasure.

28. The BASC and Devereux were also administered to Ms. Hughes. The BASC indicated no significant problem with Student's overall behavior at school although there were significant problems on the Withdrawal scale demonstrating a tendency to avoid social contact. Borderline elevations were noted on the Aggression, Adaptability, Social Skills, and the Externalizing Problems Composite scales. The Devereux indicated significant problem behaviors as to all scales: Interpersonal Problems, Inappropriate Behaviors/Feelings, Depression, and Physical Symptoms/Fear.

29. Student had a total score of 39 on the CDI. Total scores of 65 and higher are considered clinically significant. Thus, Student's score fell within the below average range, which indicates less depressive symptoms than other children of Student's age. The Kinetic Drawing System demonstrated indications of anxiety and unhappiness at school.

Ms. Popp observed Student on the playground and in the classroom. In class, Student followed the teacher's instructions, did his assignment and interacted appropriately with his peers as a whole; although at one point, Student repeatedly asked one boy the same question which appeared to annoy the boy. On the playground, Student became upset when he was accused of breaking a rule in a game he was participating in. After calming down, Student rejoined the game. On a second occasion, Student played soccer; but he got in an argument with another boy while lining up at the end of the recess period.

30. Ms. Popp concluded the written report with a recommendation that Student be found not eligible for special education under the criteria for serious emotional disturbance.³

31. On November 22, 2002, an IEP meeting was held. The IEP Team agreed with Ms. Popp's recommendation that Student did not qualify for special education because he did not meet the criteria for serious emotional disturbance "at this time." Mother, who attended the IEP meeting, consented to the findings. Because Student was found not eligible for special education, OCMH did not provide the services recommended in Dr. Schwartz's report (see Factual Finding 23).

32. Student tendered Dr. Donald Hoagland, a clinical and forensic psychologist, as an expert witness at the due process hearing. Dr. Hoagland received a B.A. in English from Taylor University and a Ph.D. in clinical psychology from the Fuller Graduate School of Psychology. He has been in private practice since 1986. Dr. Hoagland's testimony was based on his review of the March 2002 and fall 2002 assessment reports. Dr. Hoagland has never treated, assessed or met Student. Dr. Hoagland opined that Student should have been given standardized academic achievement tests to determine whether Student's behavior was affecting his educational performance. Dr. Hoagland stressed that he was not giving a professional opinion on whether the District performed an appropriate assessment in fall 2002. Based upon the limitations of Dr. Hoagland's testimony, his unfamiliarity with Student and his failure to have reviewed Student's records, the ALJ gave little weight to his testimony.

³ See Legal Conclusion 9 for the requirements for serious emotional disturbance.

33. Student also tendered Dr. Russell Griffiths, an educational psychologist in private practice who operates a learning center in Mission Viejo, California. Dr. Griffiths received his B.A. in Psychology from the University of California, Irvine, a M.S. in Counseling and School Psychology from California State University, Los Angeles, and his Doctor of Psychology from Alliant University. Dr. Griffiths has been counseling children since 1990 and was formerly an educational psychologist with the Orangewood Children's Home, a transitional home for children operated by the Orange County Social Services Agency, where he conducted an assessment on Student in fall 2003. Based upon his review of records and his involvement with Student, Dr. Griffiths opined that there was significant evidence in fall 2002 that Student was suffering from emotional difficulties. Therefore, Dr. Griffiths, had he conducted the fall 2002 assessment, would have administered standardized academic achievement tests to determine whether Student's education was being affected by his emotional difficulties. Dr. Griffiths did acknowledge that some school psychologists would rely on reports from the classroom teacher and grade reports in determining whether standardized testing was necessary since such testing is usually not advisable within one year of previous academic testing. The ALJ found that Dr. Griffiths was credible and gave great weight to his testimony.

34. The District called Dr. Nathan Hunter, a clinical psychologist, as its expert witness. Dr. Hunter received his B.S. from California State University, Dominguez Hills, and a Ph.D. in Psychology from the California School of Professional Psychology. He has been a licensed clinical psychologist for over 11 years and a credentialed school psychologist for over seven years. Dr. Hunter formerly was employed by the District and the Laguna Beach Unified School District as a school psychologist prior to entering private practice two and a half years ago. The District contracted with Dr. Hunter to conduct an independent triennial assessment in 2005. Dr. Hunter was of the professional opinion that Ms. Popp's fall 2002 assessment report recommendation that Student was not then eligible for special education under the category of serious emotional disturbance was correct. When a reassessment is conducted within a relatively short period of time such as within one year, Dr. Hunter opined that it is not necessary to conduct new standardized academic achievement testing because the best evidence of academic deterioration would be the child's report card and the classroom teacher. Because Student's grades were at or above grade level and his classroom teacher reported that Student's behavior was manageable and he was doing well academically, there was no need to conduct further academic testing of Student. The ALJ found Dr. Hunter's testimony deserving of great weight because he appeared credible, he had significant relevant experience, and his testimony was somewhat corroborated by Dr. Griffiths.

35. Student failed to establish that the fall 2002 assessment was improperly conducted (Factual Findings 34) or that Student's educational performance was being adversely affected. (Factual Findings 22 and 26.) Student continued to progress academically and was not unmanageable in the school setting. Thus, Student was not eligible for special education under the category of severe emotional disturbance in fall 2002.

The remainder of the 2002-2003 School Year and Summer 2003

36. Student continued to do well academically during the first and second trimesters in Ms. Hughes' class and his behavior problems continued at school but were manageable. Ms.

Hughes placed Student on a behavior contract. He was one of two or three boys on such a contract. In the Second Trimester report card, Ms. Hughes noted that Student “has been more focused this quarter and has made good progress” although “he needs to learn his multiplication facts thoroughly and to apply himself to the task in hand rather than giving up when he finds something difficult to master.”

37. During Spring Break 2003, Student’s behavior at home grew markedly worse culminating in a violent tantrum in which Mother was forced to call the police for assistance in calming him down. After Student calmed down, he was taken to Placentia-Linda Hospital emergency room which then referred Student to College Hospital, a psychiatric facility, for hospitalization. Student remained at College Hospital from April 6 through 15, 2003. He was prescribed Risperdal and Depakote. Student’s parents contacted the District to inform them that Student was hospitalized and would not be withdrawing from public school. Approximately three weeks later, Student was re-enrolled at Imperial School.

38. Student returned to Ms. Hughes’ class after his stay at College Hospital. Student was sleepy and lethargic from his medications which resulted in Student being unable to focus on class work. Student had trouble completing assignments and started to fall behind academically. After approximately three weeks, Student appeared to tolerate his medication better and “settled down.” On May 11, 2003, Student was taken to Orangewood Children’s Home (Orangewood) where he stayed for 2 days before returning home. Because Student then appeared to be more depressed during this period, Ms. Hughes attempted to counsel Student and give him encouragement on many occasions. Student expressed fears that he would be removed from his home. Because Student was not completing homework assignments due to problems at home, Ms. Hughes offered to have Student stay after school to do his homework. Mother did not accept this offer. At the end of the school year, Student appeared to give up on learning his multiplication tables.

39. Student’s report card indicates that his overall performance for the third trimester was not markedly different than the previous two and that he continued to progress academically. The District utilizes a grading system of one for “above average,” two for “average (grade level)”, and three for “needs improvement”. Student received the following grades in the third trimester (Student’s marks for the two previous trimesters are in parentheses): Reading- 2+ (2+, 2+), Writing-Mechanics-2 (2, 2), Writing Content-2 (2, 2), Spelling-1- (1-, 1-), Social Studies-2- (2, 2), Mathematics-2- (2, 2), and Science/Health-3 (2, 2).

August and September 2003

40. Student’s behavior continued to deteriorate at home. At the end of July 2003, Student began the fourth grade at the Imperial School. On August 14 2003, Student was again hospitalized at College Hospital because he threatened to kill himself. Student was at College Hospital from August 14 through August 26, 2003. Student then returned to school.

41. Student’s fourth grade teacher was Deborah Robbins, an experienced 11 year teacher. Ms. Robbins instantly observed that Student was not performing and behaving like a typical fourth grader. Student was extremely fidgety to such a degree that he could not stay on

task in the classroom. Student interrupted class by speaking inappropriately. Student required constant nurturing and extra care just to have him stay on task. Student made no effort to do his class work; and thus, he did not complete his work. Student would only participate in group work only if the subject interested him. The extent of his social interaction with his peers was that he played handball during recess. Student was very anxious and depressed. Student wrote a poem where he basically stated that he is lonely, feels helpless and that he is not good. Ms. Robbins notified the school principal and psychologist, Ms. Popp, about her observations. Ms. Robbins was concerned with Student's poor behavior, low self-esteem, difficulty in focusing during class, inability to work with peers and an inability to sit quietly.

42. After two or three days of school, Ms. Robbins arranged a meeting with Mother about Student's behavior. On August 27, 2003, the District received permission to conduct a pupil assessment from Mother. Ms. Popp then initiated the process of assessing Student because of the report from Ms. Robbins.

43. On August 28, 2003, Student had a very difficult morning refusing to go to school. The school custodian, Jose Soto, had to assist in getting Student out of Mother's car and into school. Later, Student threatened to kill himself. Ms. Popp counseled Student and then had him sign an agreement that he would not hurt himself or run away and that he would tell his parents should he have such thoughts. Ms. Popp then contacted Student's therapist and Mother. Student was taken to Orangewood by his parents on August 29, 2003.

44. At Orangewood, Student attended the William Lyon School, which is on the Orangewood grounds. The William Lyon School is operated by the Orange County Department of Education (OCDE). Student was placed in a small, structured classroom environment where there was a daily point system of rewards and privileges given for appropriate behavior and work completion. Additionally, Student was assigned a one- to- one aide due to Student's attempts to elope and verbal threats to hurt himself. Student continued to be lethargic in class and frustrated easily. During this time, Student went through a lot of emotional difficulties which affected his ability to focus in the classroom.

October 23, 2003 Assessment and IEP Meetings of October 23, 2003 and November 5, 2003

45. In starting a new assessment of Student, Ms. Popp administered the Behavior Assessment System for Children-Teacher Rating Scales (BASC) and the Child Behavior Checklist Teacher's Report Form for Ages 5-18 (CBCL) to Student's fourth grade teacher, Ms. Robbins. The BASC total score of 74 placed Student in the 97th percentile indicating significant behavior problems. Student's core scores in the areas of Depression and Internalizing Problems Composite were in the significant level range while borderline levels were noted as to Hyperactivity, Aggression, Anxiety, Atypicality, Withdrawal, Attention Problems, Adaptability, Study Skills, Externalizing Problem Composite, and School Problems Composite. The CBCL total score of 76 was within the Clinical range indicating significant behavioral and emotional problems in the school setting. Significant levels were noted on the Anxious/Depressed, Social Problems, Thought Problems, and the Internalizing and Externalizing scales. Clinically significant problems were noted in the areas of Working Hard, Behaving Appropriately, and

Happy scales. Borderline Clinical ratings, which indicate a borderline level of severity, were noted on the Withdrawal and Aggressive Behavior scales.

46. Dr. Russell Griffiths completed the assessment on behalf of the OCDE. Student was given the Woodcock Johnson Achievement Battery Third Edition (WJ-III) to measure his scholastic aptitude and achievement. Student's scores reflected average to above average skills in the areas of Reading, Mathematics and Written Language. Student's scores, when compared to the previous testing done by Dr. Maxann Schwartz in March 2002, showed deterioration in Student's academic achievement.

Dr. Griffiths administered the Piers-Harris Children's Self-Concept Scale (Piers-Harris) and the Trauma Symptom Checklist for Children (TSCC). Piers-Harris is a self-report measure designed to aid in the measurement of self-concept in children. Student scored well below the mean score in the areas of Freedom of Anxiety, Popularity, Happiness and Satisfaction, and Behavior Adjustment. The TSCC is also a self-report measure of post-traumatic stress and related psychological symptomatology. Student scored clinically significant in Depression and slightly below clinically significant in Anxiety.

47. Dr. Griffiths concluded that Student met the criteria for serious emotional disturbance in all five categories listed under California Code of Regulations, title 5, section 3030, subsection (i). Dr. Griffiths recommended that Student be placed in a classroom environment that will address his emotional needs and behavior issues; that he be referred to OCMH so as to provide support services to Student's family including psychiatric and medication consulting; that Student and his family receive therapy from a therapist with training in adoption and early attachment issues; and that assistance be given to Student's family in developing a crisis plan should Student's behavior become out of control once Student returned home.

48. At the IEP meeting of October 23, 2003, the team members agreed that Student was doing well in the small self-contained class at the William Lyon School where he had a one-to-one aide; that Student would be placed in Canyon Acres, a group home; and that Student would be placed in a Special Day Class at the time that Student transfers back into OUSD after the move to Canyon Acres. As part of its program, Canyon Acres provides psychotherapy and family counseling.

49. In November 2003, Student returned to the District and he was placed in the Special Day Class of Michelle Lovitt at the Crescent Intermediate School. Ms. Lovitt received her B.S. in Business and a M.S. in Counseling from the California State University, Fullerton, and a M.S. in Special Education from National University. Ms. Lovitt has both CLAD and Special Education certificates. She worked as a counselor/therapist at a non-public school for one and a half years, two years as a Resource Specialist and four years as a Special Day Class teacher. Ms. Lovitt's class comprised six to seven students who all were classified as Emotionally Disturbed. Ms. Lovitt instituted a system to reward appropriate behavior through verbal reinforcement and the award of "class store money" which would permit students to earn credits to buy things.

50. On November 3, 2003, an IEP meeting was held to gauge Student's progress after 30 days in Ms. Lovitt's class. The IEP team agreed that Student continue in Ms. Lovitt's Special Day Class even though Student was encountering difficulties in transitioning to the class. The IEP report noted that Student was taking the following medications: Strattera, Depakote and Risperdal.

December 2003 through Spring 2004

51. On December 19, 2003, the IEP team met and determined that Student was still adjusting to the new environment in Ms. Lovitt's class and that more time was needed to determine if a behavior plan would be needed.

52. Beginning in February 2004, Student's behavior at Crescent began to decline markedly. Student began to refuse to do work in class and would then leave the classroom, sleep in class, scratch his arms to make them bleed, continually disrupt the class, upset his peers and leave the campus. Student also threatened other students to stab with a sharpened pencil and assaulted staff including the principal twice. On one occasion, Student wandered in a room with a screwdriver which caused a staff member to fear for his own safety. Starting in February 2004, Student began to have problems transitioning to school after arriving by bus each morning. An IEP meeting was held on March 15, 2004 and an addendum was adapted to the previous IEP which required a Canyon Acres staff member to be present each morning to assist Student in arriving at his assigned class. In April, Student threw chairs at Ms. Lovitt, attacked classmates and an intervening staff member and kicked an instructional aide in the bathroom. Student struck an instructional aide and attacked the principal in the last week of April. On May 4, 2004, Student stabbed his Canyon Acres escort on school grounds with a pencil. Because of the severity of the problems, a Canyon Acres staff member escorted Student throughout the school day.

Student's behavior deterioration appeared to coincide with a visit from his parents where he was told that he would be sent to a nonpublic school.

53. On March 16, 2004, Student filed the instant petition naming the District and OCMH as respondents. On April 30, 2004, the three parties entered into a partial agreement during a mediation session. Student withdrew the petition with prejudice as to OCMH in exchange for OCMH agreeing to fund the cost of the placement of Student at Canyon Acres and to "provide case management quarterly and as needed." Student would remain at Crescent "for the present," and an IEP meeting would be held prior to the end of the school year.

54. On May 10, 2004, an IEP meeting was held to discuss Student's behavior. The IEP team decided that Student required a Support Plan for Behavior. It was decided to alter the behavior management plan by deducting "class money" when Student's behavior was inappropriate. A Canyon Acres aide, Jeff, would continue to remain throughout the school day to offer Student support and to keep him on task. Canyon Acres staff recommended that Student be placed in a nonpublic school (NPS) for the next school year commencing that summer, and the IEP team agreed with that recommendation.

55. On May 26, 2004, and June 9, 2004, IEP meetings were held to review Student's behavior plan. Jennifer Gonzalez, a Behavior Specialist/School Psychologist, presented a report and the IEP team agreed to her recommendation to shorten Student's school day to three hours commencing at eight o'clock. The team also agreed to consider Home/Hospital instruction if Student was unable to be maintained at school for the three hour period for the remainder of the school year. It was also agreed that Student be placed in a nonpublic school, Canal Street Elementary School, commencing with summer school.

56. The IEP adopted at the October 23, 2003 meeting for the 2003-2004 school year and its implementation of it by the District was designed to address Student's unique needs and was reasonably calculated to provide him with educational benefit in the least restricted environment.

The 2004-2005 School Year

57. Student began attending the Canal Street Elementary School on June 28, 2004. Canal Street is a NPS specializing in educating children who have been placed in special education under the criteria of serious emotional disturbance. Canal Street utilizes proactive basic behavior training, high staff to student ratio, and weekly individual and group therapy. The school maintains a timeout area where students can go to calm themselves either voluntarily or at the direction of staff. Each class comprises 12 or less students with a teacher and two assistant teachers. A therapist is assigned to work with each class in group and individual therapy. A treatment team is assigned to each student. The treatment team consists of the Site Director, Clinical Program Supervisor, and a Behavior Specialist who is assigned to the class, the class therapist, the teacher and the two assistant teachers.

At the time that he started at Canal Street, Student was living at Canyon Acres. Student did well both academically and with his behavior at school and the group home. Student received "outstanding" in all his academic subjects through December 2004. Student actively participated in group discussions and turned in neat and accurate work. Teachers also noted that Student was a self-starter who respected the rights of others. In an IEP meeting on October 7, 2004, the Canal Street therapist reported that Student was doing well and the treatment team discussed having Student mainstreamed back to public school due to stability in his current setting, high intellectual functioning and behavioral compliance.

58. On December 23, 2004, Christine Lewis, M.A., MFTI, a Canyon Acres counselor, submitted a quarterly report. Ms. Lewis noted that Student had been diagnosed with Oppositional Defiant Disorder,⁴ Reactive Attachment Disorder, Disinhibited Type,⁵ and Mood

⁴ Oppositional Defiant Disorder is a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures which leads to significant impairment in social, academic, or occupational functioning. (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision (DSM-IV) (2000), p. 100)

⁵ "The essential feature of Reactive Attachment Disorder is markedly disturbed and developmentally inappropriate social relatedness in most contexts that begins before age 5 years and is associated with grossly pathological care." (DSM-IV, p. 127) In the Disinhibited Type, "the child exhibits indiscriminate sociability or a lack of selectivity in the choice of attachment figures." (DSM-IV, p. 128) In the Inhibited Type, "the child fails to

Disorder Not Otherwise Specified. Ms. Lewis noted in her report that Student was taking Risperdal and Concerto for management of impulsivity, aggression, restlessness and lack of attention.

59. On January 24, 2005, the IEP team met. It was reported that Student became “whiny” since visiting his parents although there was no effect on his academic work. Canal Street staff recommended that Student should be transitioned to public school as the least restrictive environment based on his excellent progress at Canal Street. Because Student was about to return to live with his parents, the IEP team believed that a transition to public school at this time should not occur as it would not be in Student’s interest to be undergoing two transitions in the same immediate time period. OCMH recommended outpatient services to meet the IEP goals rather than continued residential placement. OCMH proposed discontinuing funding for residential placement as of February 24, 2005.

60. While attending parenting classes in the “Love and Logic” method⁶ at a local church, Mother and Father met Maryanne Rigby, a therapist. On March 7, 2005, Student and his family began therapy with Ms. Rigby, a registered marriage and family therapist intern with Curtis C. Rouanzoin, Ph.D. & Associates. Ms. Rigby has a B.A. from The Masters College and a M.A. in Clinical Psychology with a Child Studies Specialization from Antioch University. Ms. Rigby noted that when she first saw Student, he had already been diagnosed with Reactive Attachment Disorder (RAD) by Canyon Acres.

Ms. Rigby agreed with the RAD diagnosis based on the break in caregivers during Student’s first eight months and his behavioral history. RAD hinders a child’s attaching and bonding appropriately with his parents, especially the mother, or chief care givers.

Ms. Rigby stated that the typical behavior problems experienced by children with RAD are: poor peer relationships, bullying, disruption of class, difficulty making eye contact, difficulty in concentrating, anxiety, low self-esteem, and attempting to be in control when playing playground games. Ms. Rigby noted that the usual therapy for children, play therapy, was ineffective in treating RAD. Therapists treating RAD find that confrontational therapy is the most effective therapy.

61. On April 14, 2005, the IEP team met and agreed to have Student continue at the Canal Street School. Student’s parents declined to accept services being offered by OCMH because they desired to continue with the “Love and Logic” therapeutic program which was utilized by parents on the recommendation of Ms. Rigby.

persistently initiate and respond to most social interactions in a developmentally appropriate way.” (DSM-IV, p. 127)

⁶Love and Logic is a therapeutic parenting program based upon books by Dr. Foster Cline. Love and Logic sets up an accountability system where a child receives rewards for proper behavior. This permits a caregiver to be a cheerleader instead of merely criticizing improper behavior. The theory is that a child will then learn to properly behave.

62. As part of therapy, Ms. Rigby referred Student and his family to an extensive program operated by Attachment Center West (ACW) designed for children with RAD and their families. The program is a nonresidential course that lasts four to five hours daily with four to five therapists including Connie Hornyak and Dr. Angie Dickson. The program attempts to teach the child to deal with their anger and resentment caused by their past, and to demonstrate to the parents the feelings of the child. Student and his family attended the ACW program from May 31 through June 10, 2005. As part of the ACW program, Student was sent to live in respite care provided by Denise Baker for the week prior to program and for the two weeks that the program lasted. The cost for the program at ACW was \$8,050.00. Additionally, Student's parents paid Ms. Baker \$1,000.00.

63. Following the two week program, the ACW therapists felt that Student and his family required extensive services. ACW recommended that Student continue with individual therapy, that parents continue in therapy with Dr. Angie Dickson of ACW, that parents go to marriage counseling, and that Mother go into individual counseling. Student's parents did not follow the ACW recommendations.

64. Student called as his main expert witness Connie Hornyak, a licensed clinical social worker for 25 years and the founder and current director of the ACW. Ms. Hornyak received her B.A. in Human Development and her M.S.W. from the University of Denver. Ms. Hornyak also is a registered agent with the Association for Treatment and Training in the Attachment of Children. Ms. Hornyak has specialized in the treatment of children with attachment disorders, including RAD. It was Ms. Hornyak's professional opinion that Student was suffering from Oppositional Defiant Disorder (ODD) which is similar to RAD. Ms. Hornyak opined that Student also suffered from an attachment disorder. Ms. Hornyak attributed the disorder to Student's dysfunctional relationship with his mother because Mother lacked empathy and was seriously disturbed and not willing to look at her own past to resolve her emotional problems. This caused Student to feel that Mother rejected him. Thus, Ms. Hornyak observed that it is impossible for Student to bond with Mother who is emotionally unhealthy. Ms. Hornyak stated that ACW does not utilize Love and Logic therapy. Ms. Hornyak also noted that Love and Logic was not specifically designed to treat RAD. The ALJ found Ms. Hornyak's testimony deserving of great weight based on her expertise and experience in dealing with children suffering attachment problems.

65. Student has consistently received high scholastic marks and has been a model student since starting Canal Street. Student was named the Student of the Year for the 2004-2005 school year.

66. The IEP adopted at the June 9, 2004 and April 14, 2005 meetings was designed to meet, and did meet, Student's unique needs and was reasonably calculated to, and did, provide him with educational benefit as Student succeeded academically and socially at Canal Street. The mental health services offered by OCMH and provided by Canal Street were sufficient to meet Student's unique needs in that the services were compatible to those recommended by ACW.

The 2005-2006 School Year and Triennial Assessment

67. Student returned to Canal Street for the 2005-2006 school year where he continued to succeed both socially and academically. Canal Street staff felt that Student's behavior at home did not affect his school work.

68. On October 5, 2005, the annual IEP meeting was held. Mother reported that Student's after-school behavior was regressing and that Student was having difficulty completing homework. Teachers noted a decline in Student's testing scores, continued problems in math, a decline in Student's memory skills, and that Student exhibited a flat affect. Parents requested the District (1) fund after-school care in a structured environment by Denise Baker pursuant to a recommendation from Student's treating psychiatrist⁷ and (2) conduct a triennial assessment. The District agreed to conduct the triennial assessment early but denied the after-school funding.

69. On October 18, 2005, Mother requested in writing that the District fund after-school care by Ms. Baker because Student was refusing to do his homework and threw tantrums. The District, by letter dated October 26, 2005, declined Mother's request because the District had offered a comprehensive educational program that was meeting all of Student's needs as manifested in the school setting.

70. Dr. Nathan Hunter conducted a triennial psychoeducational assessment from November 10 through December 6, 2005. The District contracted with Dr. Hunter to conduct an independent evaluation of Student.

71. Dr. Hunter tested Student in the areas of (1) cognitive ability, (2) academic achievement, (3) executive functions, (4) attention and concentration, (5) learning and memory, (6) visuospatial processing, (7) sensory-motor functioning, (8) auditory processing and (9) social/emotional/personality.

72. Dr. Hunter found Student's cognitive ability to be on the cusp of average to high average range. Student's level of academic achievement ranged from significantly above average in spelling, written expression, and pseudoword decoding, to average in word reading, reading comprehension, listening comprehension and word expression, to low average in the areas of numerical operations and math reasoning. Tests for all other areas resulted in scores in the average range.

73. In the social/emotional/personality area, Dr. Hunter conducted interviews with Father, Student, the Canal Street School administrator and the school therapist. He also performed a mental status examination. Dr. Hunter administered the following tests: Behavior Assessment for Children (BASC), Roberts Apperception Test for Children, Kovacs's Children Depression Inventory, Multidimensional Anxiety Scale for Children, Draw-A-Person, and the Scale for Assessing Emotional Disturbance. Dr. Hunter reviewed past mental and school assessments.

⁷ The recommendation was made on a prescription sheet without citing any reasons to support the recommendation. Student offered no other evidence as to this issue.

74. Dr. Hunter concluded that Student met the DSM-IV diagnostic criteria for Anxiety Disorder, Not Otherwise Specified (NOS). Dr. Hunter utilized the NOS designation to clearly document the presence of ongoing and clinically significant anxiety for Student without having sufficient background information to determine whether Student's anxiety disorder could be related to another disorder such as RAD or Separation Anxiety.⁸ Dr. Hunter recommended that the IEP team find Student eligible for special education under serious emotional disturbance under the first category (an inability to learn which cannot be explained by intellectual, sensory, or other health factors based on Student's low performance in mathematics), third category (inappropriate types of behavior or feelings under normal circumstances based on Student's depressive presentation and tearfulness in the classroom at times), fourth category (a general pervasive mood of unhappiness or depression in that Student exhibits sustained depressive features), and fifth category (tendency to develop physical symptoms or fears associated with personal or school problems based on Student appearing to evidence fears associated with personal and family problems which is part of his anxiety in anticipation of being separated from his parents). Dr. Hunter noted that although Student has been making progress educationally, there is an adverse effect on Student's education because of lower levels of sustained motivation towards academics, a reduction of skills in mathematics and lost class time to emotional feelings that brings Student off task.

75. Dr. Hunter made a number of recommendations including placing Student in an academic setting which ensures small class size and where the staff has training and awareness in the areas of emotional disturbance. Dr. Hunter recommended that Student follow through with recommendations of the current OCMH evaluation, and that Mother and Father continue working to improve parent-child interaction.

76. Dr. Michael Mullen, a clinical psychologist with OCMH, conducted a mental health assessment and wrote a report dated February 8, 2006. Dr. Mullen received his B.A. in Psychology and Sociology from the University of West Florida, a M.A. in Psychology from Pepperdine University and a Ph.D. in Clinical Psychology from the United States International University. He completed a post-doctoral fellowship in forensic child psychology in 1991. Dr. Mullen, in addition to his employment with the Children and Youth Services Division of OCMH, has maintained a private practice in Laguna Hills for 14 years. Dr. Mullen has also taught at the California School of Professional Psychology.

77. Student's parents refused to permit Dr. Mullen to have contact with Student's former and current therapists or access their records nor contact Mother because of her fragile emotional state. In conducting his evaluation, Dr. Mullen conducted a mental status examination and clinical interview with Student, interviewed Father, interviewed professionals who had direct contact with Student, and administered the Personality Inventory for Children, Second Edition (PIC-2) and the Rorschach Inkblot Test (RIT). Dr. Mullen concluded that Student was "depressed to the point of occasional psychiatric losses of contact with reality." (Mullen, Chapter 26.5 Mental Health Assessment) Dr. Mullen found that Student's emotional issues

⁸ Dr. Hunter testified that Father refused to permit Dr. Hunter to confer with Student's current or past therapists or clinicians from Student's past psychiatric hospitalizations.

made it difficult for him to benefit from his special education program. Dr. Mullen was of the professional opinion that Student was suffering from a long standing and chronic Dysthymic Disorder⁹ associated with parent-child conflict. Dr. Mullen recommended that Student be provided psycho-therapy twice per month for 45-50 minutes. Dr. Mullen explained that OCMH provides family therapy services as part of its service even though he failed to list it in his report and service proffer at the February triennial meeting. Dr. Mullen never discussed OCMH's proffer since Father stated that Student would not accept OCMH's services.

78. The District provided Student FAPE for the 2005-2006 school year in that Student's unique needs were met (1) by continued placement at the Canal Street School, (2) the proffered mental health services and the therapeutic services provided by Canal Street were sufficient to meet Student's needs, and (3) Student continued to demonstrate progress educationally and socially. Student offered no persuasive evidence to support his claim that a structured after-school program was required.

LEGAL CONCLUSIONS

Applicable Law

1. OAH only possesses jurisdiction to hear due process claims arising under the Individual with Disabilities Education Act and the Individuals with Disabilities Education Improvement Act of 2004. This does not include claims to enforce prior orders or settlements as such claims are not within the jurisdiction specified under Education Code section 56501, subdivision (a). (*Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026, 1029, *cert. denied* (2002) 534 U.S. 1140 [122 S.Ct. 1091, 151 L.Ed.2d 990].)

2. The United States Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, [126 S. Ct. 528, 163 L.ED.2d 387].) Accordingly, Student has the burden of proof as to all issues.

3. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

⁹ The essential feature of Dysthymic Disorder is a chronically depressed mood that occurs most of the day with two or more of the following: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and/or feelings of hopelessness. The symptoms of this disorder cause clinically significant impairment in social, occupational, or other important areas of functioning. (DSM-IV, pp. 376-381)

Children with disabilities have a right to a FAPE that emphasizes special education and related services designed to meet their unique needs. (Ed. Code, § 56000.) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56363.) Special education related services include in pertinent part psychological services as may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

4. In *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690], the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

5. Parents of children with disabilities are also provided procedural protections under the IDEA. (20 U.S.C. § 1400, *et seq.*) The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE. (20 U.S.C. § 1415 (f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Thus, mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.)

6. The IDEA places an affirmative duty on the state to identify, locate, and evaluate all children with disabilities residing in the state. (20 U.S.C. § 1412(a)(3).) California specifically obligates the District to actively and systematically seek out "all individuals with exceptional needs." (Ed. Code, § 56300 *et seq.*) A district's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Haw. 2001) 158 F. Supp. 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.*, at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

7. Before any action is taken with respect to an initial placement of an individual with exceptional needs in special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.532, subd. (f); Ed. Code, § 56320.)

8. California Education Code section 56320, subdivision (g), requires that the assessment be conducted by persons knowledgeable of the suspected disability. The assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.532(d); Ed. Code, § 56320, subd. (c).) Moreover, psychological assessments, including individually administered tests of intellectual or emotional functioning, must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320, subd. (b)(3), and 56324.) Assessments must be conducted by persons competent to perform assessments, as determined by the school district, county office, or special education local plan. (20 U.S.C § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.532 (c)(1)(ii); Ed. Code, § 56322.)

9. Pursuant to 34 Code of Federal Regulations, section 300.7(c)(4)(i) and California Code of Regulations, title 5, section 3030, subdivision (i), eligibility for special education under the classification of serious emotional disturbance requires that the student exhibit one or more of the following characteristics over a long period of time and to a marked degree, which must adversely affect educational performance:

1. In inability to learn which cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory, interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
4. A general pervasive mood of unhappiness or depression;
5. A tendency to develop physical symptoms or fears associated with personal or school problems.

10. The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of the school cannot be “judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 0141; see also *Christopher S. v. Stanislaus County Office of Education* (9th Cir. 2004) 384 F.3d 1205, 1212.)

11. To determine whether the district offered a student a FAPE, the analysis must focus on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that school district provided a FAPE, even if the student’s parents preferred another program and even if his parents’ preferred program

would have resulted in greater educational benefit. The IDEA does not require that parental preferences be implemented, as long as the IEP is reasonably calculated to provide some educational benefits. (*Blackmon v. Springfield R-XII School District* (8th Cir. 1999) 198 F.3d 648, 658.)

12. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a) (5) (A); 34 C.F.R. § 300.550(b); Ed. Code, § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Id.*) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1044-45; see also *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, *cert. denied* (1994) 512 U.S. 1207 [114 S.Ct. 2679, 129 L.Ed.2d 2679].)

13. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S. Ct. 1996, 85 L. Ed. 2d 385].) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361, 126 L. Ed. 2d 284].)

Determination of Issues

Issue 1: Did the District deny Student a FAPE by failing to find him eligible for special education services under the category of severe emotional disturbance in March 2002?

14. Based upon Legal Conclusion 2, 3, 4, 7, 8, 9 and 10 and Factual Findings 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, the District did not deny Student FAPE because (1) Student did not meet the eligibility requirements for special education under the category of serious emotional disturbance in that Student's negative behaviors did not result in an impairment of Student's ability to benefit from the school setting nor (2) did it have an adverse effect upon Student's educational performance.¹⁰

¹⁰ Student failed to produce any evidence that the March 2002 assessment and recommendation of non-eligibility for special education by Dr. Maxann Schwartz was improper. Dr. Griffiths offered opinion testimony that he did not disagree with Dr. Schwartz's findings and recommendation. Student did not attempt to elicit any opinion from his expert witness, Dr. Hoagland, as to the March 2002 assessment report.

Issue 2: Did the District deny Student a FAPE by failing to find him eligible for special education services under the category of severe emotional disturbance during the 2002-2003 school year?

15. Based upon Legal Conclusions 2, 3, 4, 7, 8, 9 and 10 and Factual Findings 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, and 39, the District did not deny Student FAPE in the 2002-2003 school year because (1) the fall 2002 assessment was properly conducted, and (2) Student was not eligible for special education under the category of serious emotional disturbance since Student's emotional difficulties were not adversely affecting his educational performance.

Issue 3: Has the District denied Student a FAPE since the 2002-2003 school years?

16. Because Student's claims for school years 2003-2004, 2004-2005 and 2005-2006 deal with the sufficiency of mental health services provided by OCMH pursuant to the April 30, 2004 settlement agreement (Factual Finding 53), Student's claim is one in the nature of enforcing that agreement. Based upon Legal Conclusion 1, OAH lacks jurisdiction to hear this issue.

In the alternative for the 2003-2004, 2004-2005 and 2005-2006 school years

17. Based upon Legal Conclusion 2, 3, 4, 9, 10, 11, and Factual Findings 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56, the District did offer Student FAPE for the 2003-2004 school year in that (1) the District implemented the IEP adopted by the OCDE and (2) the District attempted to amend the IEP in an effort to meet Student's unique needs in the least restricted environment as conditions changed. Additionally, Student has failed to demonstrate that the IEP adopted and implemented by the District for the 2003-2004 school year failed to meet Student's unique educational needs and was not reasonably calculated to provide him with educational benefit in the least restricted environment.

18. Based upon Legal Conclusion 2, 3, 4, 8, 9, 10, 11 and 12 and Factual Findings 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 78, the District provided Student with FAPE for the 2004-2005 and 2005-2006 school years as the IEPs were designed to, and did, address Student's unique educational needs and were calculated to and did, provide Student with educational benefit. Here Student's parents merely prefer a different therapy program than the one which was offered by OCMH. The IDEA does not require that a school district implement parents' preferences as to what programs are to be provided as long as the IEP is reasonably calculated to provide some educational benefits. (*Blackmon v. R-XII School District* (8th Cir. 1999) 198 F.3d 648, 658.)

Issue 4: Did the District commit procedural violations of Student's rights which resulted in substantive denials of a FAPE?

19. In March 2002 and November 2002, Student was not eligible for special education and, thus, suffered no loss of services as a result. (Legal Conclusions 14 and 15.) Therefore, Student can not demonstrate that he was denied FAPE in March 2002 and November

2002 because the District failed to give prior written notice of the IEP team finding Student ineligible for special education services pursuant to Code of Federal Regulation, title 34, section 300.503 and Education Code, section 56500.4.

20. Student offered no evidence to demonstrate that (1) his parents were prevented from participating in the decision-making process regarding the provision of FAPE, (2) his right to FAPE was impeded, or (3) he suffered a deprivation of educational benefits. (Legal Conclusions 5 and 18.) Therefore, Student failed to demonstrate that he was denied FAPE in 2005 because the District failed to provide prior written notice that it rejected Student's request for therapeutic services based on the Love and Logic program.

Issue 5: Are Student's parents entitled to reimbursement of the costs that they expended for mental health services, residential respite care and other services in 2002, 2003, 2004, 2005 and 2006 and is Student entitled to compensatory education?

21. Because Student has failed to prevail as to Issues 1 through 4 (Legal Conclusion 13, 14, 15, 16, 17 and 18), Student has failed to demonstrate that he is entitled to (1) reimbursement for services that his parents procured for him and (2) compensatory education. (Legal Conclusion 12.)

ORDER

In light of the above factual findings and legal conclusions, all of Student's request for relief are denied.

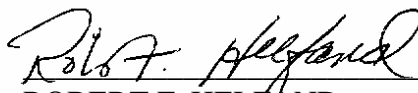
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: *The District prevailed on all issues heard and decided.*

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (California Education Code § 56505, subd. (k).)

Dated: November 2, 2006



ROBERT F. HELEAND
Administrative Law Judge
Office of Administrative Hearings
Special Education Division